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No. 865

IN THE

Supreme Court of the United States

October Term, 1963

LESLIE BROWN, BERNARD WEISS AND ALBERT WOHL,

Petitioners,

vs.

THE UNAUTHORIZED PRACTICE OF LAW COMMITTEE OF CUYAHOGA COUNTY, OHIO,

Respondent.

PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI

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PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI

Petitioners respectfully pray for a rehearing and for reversal of the order heretofore entered herein on the 6th day of April, 1964 denying their petition for writ of certiorari to the Supreme Court of Ohio, upon the following grounds:

THE PROCEEDINGS BELOW

June 29, 1962 in a disciplinary proceeding in the Court of Common Pleas, cause number 722,206, Cuyahoga County and State of Ohio, judgment was entered against the said petitioners whereby they, individually and as a partnership, were enjoined from engaging in the representation of claimants before certain administrative agencies, viz. the Industrial Commission of Ohio and related, subservient agencies, and said petitioners were ordered to pay the costs of said proceedings. Said judgment is unreported.

November 10, 1962, in an unreported opinion, the Court of Appeals of Ohio for the Eighth Judicial District (Cuyahoga County) affirmed the judgment and decree of the trial court.

July 10, 1963 in an opinion reported at 175 O.S. 149, 192 N.E. 2d 54, the Supreme Court of the State of Ohio affirmed the judgment of the said Court of Appeals. Application for rehearing was duly filed on July 24, 1963, and was denied by order, unreported, of the Supreme Court of the State of Ohio on September 25, 1963.

On December 19, 1963, an order was made and entered in the Supreme Court of the United States by which the time within which to file a petition for a writ of certiorari in this cause was extended to and including January 30, 1964. On January 29, 1964, an order was made and entered in the Supreme Court of the United States whereby the time within which to file a petition for a writ of certiorari in this cause was further extended to and including February 21, 1964. Petition for writ of certiorari was filed herein on the 21st day of February, 1964. Respondent's Brief in Opposition was duly filed, and petitioners' Reply Brief was filed herein within the time allowed therefor.

The petition for rehearing after denial of certiorari is made under favor of jurisdiction conferred upon the Supreme Court of the United States by Section 1257 (3) of Title 28 of the United States Code and by Rule 58 (2) of the Revised Rules of the Supreme Court of the United States to review by writ of certiorari to the Supreme Court of the State of Ohio said judgment of July 10, 1963 and said order of September 25, 1963. Order permitting petition for rehearing after denial of certiorari to be filed herein was made and entered on April 8, 1964 by Associate Justice Potter Stewart upon application duly made therefor within the time limited.

GROUNDS UPON WHICH PETITION FOR REHEARING IS BASED

Both the petition for writ of certiorari and the petition for rehearing have invoked the jurisdiction of the Supreme Court of the United States conferred by Section 1257 (3) of Title 28 of the United States Code, and, more narrowly, said Section's final clause,

> "* * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, of the United States."

Fortunately respondent is required, on petition for writ of certiorari, to present a brief in opposition. The respondent's brief in opposition is most illuminating, and it has placed before the Supreme Court of the United States in the case at bar the crux of the situation, viz., that the State may regulate the practice of law. But the question of definition of the practice of law yet remains. Petitioners on petition for writ of certiorari could not, and did not, suggest to the Supreme Court of the United States that the validity of the determinations below that the representation of claimants before agencies created by the Workmen's Compensation Laws of the State of Ohio be reviewed. But petitioners suggest and urge that the defense, or grounds of opposition to the grant of certiorari, made by respondent as stated at page 6 of the Brief of Respondent in Opposition,

> "We do not ignore the multiplicity of questions set out in the petition simply because of our inability to fathom their meaning and or their relationship to the jurisdiction of this Court so far as it concerns state court decisions based on state rather than federal law. We do so primarily because all of the questions, in the final analysis, resolve into a single inquiry.
>
> "This is whether the courts of a State have *the right to determine what services rendered for others constitute the practice of law and the right to determine whether the practice of law before the courts and ad-*

> *administrative agencies of the State*, should be limited to "those authorized by the State to engage in the practice of law." (emphasis added)

be required to define that which is the practice of law according to the requirements of the law of the State of Ohio in this instance. The portion emphasized above has been so emphasized to show how the respondent has committed the error of logic of jumping to the conclusion. According to respondent's words of counsel's choice, the single inquiry is whether the courts of the State have the right to determine what services rendered for others constitute the practice of law. This right the courts of the State assuredly have, and nowhere can it be considered that petitioners have contended that the courts of the State do not have this right, this power, this authority, provided the courts make a determination according to the law of the State and within limitations imposed by the Constitution of the State of Ohio and by the Constitution of the United States. Petitioners do contend that in the judgment, review of which is sought, the courts of the State of Ohio, in the case at bar, have not determined that the representation of claimants before the administrative agencies created by the Workmen's Compensation Laws of the State of Ohio constitutes the practice of law, and the record is devoid of a showing of consideration given to such inquiry. Rather, and we come to the balance of the emphasized portion of the quotation immediately hereinabove, respondent has jumped to the conclusion that such representation is the practice of law. The single inquiry suddenly doubles. The single inquiry becomes also whether the courts of the State have the right to limit the practice of law before agencies and the courts of the State. It is readily conceded that the courts of the State may limit, and certainly must limit, the practice of law to those authorized thereunto. But the question re-

mains of whether the representation of claimants before administrative agencies in Workmen's Compensation matters constitutes the practice of law. In all proceedings heretofore, this question, the crux of the entire controversy, has been untouched by analysis and has been incorrectly resolved by having been leaped over. Petitioners respectfully suggest and urge that this cause should be remanded to the courts of the State for resolution of the issue according to the laws of the State and the Constitution of the State of Ohio and of the United States.

The judgment, review of which was sought by petition for writ of certiorari, denied, and review of which is sought anew by the instant petition for rehearing, is deficient in the following respects:

1. Said judgment assumes to discipline, as it members of the legal profession, persons *sui generis* and admittedly not of that profession.

Since respondent is a Court's Committee, acting for the Court (appendix to the petition for writ of certiorari herein, p. 31), this was certainly action by the State of Ohio in violation of the right of petitioners to engage in their accustomed line of endeavor. *U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588. This contention was advanced in the petition for writ of certiorari, and is deemed properly renewed for the reason that the defensive posture, based upon the adequate state ground theory of decision, cannot be maintained nor sustained where the claimed adequate state ground violates, as in the case at bar, Article I, Section 1, of the Constitution of the State of Ohio. (Appendix to petition for writ of certiorari, page 69.)

Said judgment is further deficient:

2. Said judgment offends against Article II, Section 28, of the Constitution of the State of Ohio, for it is made to act retrospectively.

The pertinent part of said Constitutional provision is,

> "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; * * *"

Reference is made again to the manifest denial to petitioners of their Federal Constitutional right conferred by Article I, Section 10, clause 1, of the Constitution of the United States. The claim, petitioners again assert, and it is deemed advisedly done and within the limitations imposed by said Rule 38 (2), that the judgment review of which is sought rests upon an adequate state ground cannot be maintained, nor upheld, where the judgment also, and at the same time, offends against a provision of the Constitution of the State of Ohio.

Particular reference may be made appropriately herein to misconceptions expressed by the Supreme Court of the State of Ohio as to the significance of the Workmen's Compensation Amendment to the Constitution of the State of Ohio. It has been asserted by respondent throughout the entire proceedings herein that petitioners were engaged in the business of advising claimants as to their legal rights. This seems to require definition of legal rights. The rights of claimants, in view of Article II, Section 35, of the Constitution of the State of Ohio, petitioners respectfully submit, are not legal rights in the sense that such rights are those enforceable by a remedy at law, but they are rights to participate in

> "a state fund * * * created by compulsory contribution thereto by employers, and administered by the state * * *"

There is a clear distinction between rights to a fund, not enforceable in any proceeding at law by enforcement of a legal remedy, and rights at law, or in equity, in which members of the legal profession are trained. The members of

the legal profession, it is respectfully submitted, are trained to bring to fruition those rights which are enforceable at law or in equity. They are not specially trained to evaluate, or to enforce, rights to a particular fund.

Section 4123.519 of the Revised Code of the State of Ohio shows in several respects that a claim for compensation does not become an adversary proceeding until it has proceeded to the point at which an appeal to the Court of Common Pleas of the State of Ohio may be had. At such point the claim as to questions of its validity, becomes one to be prosecuted according to law and according to rights under the law, and at that stage, the question of amount of, or extent of compensation, remains an entirely administrative matter.

SUMMARY AND CONCLUSION

The Brief in Opposition herein states that the judgment review of which is sought rests upon adequate state grounds. Petitioners submit that refuge cannot be taken in the concept of adequate state grounds, where the judgment is manifestly contrary to the laws of the State, and to the Constitution of the State in respects which are entirely the same as those which have been established by the petition for writ of certiorari herein, and by the petition for rehearing herein, as violative of limitations imposed by the Constitution of the United States.

It is respectfully urged therefore that the petition for rehearing be granted.

Respectfully submitted,

ALEXANDER H. MARTIN, JR.
Attorney for Petitioners

Dated: April 29, 1964

CERTIFICATE OF COUNSEL

I hereby certify that the above petition for rehearing is presented in good faith and not for delay and that said petition is restricted to the grounds above specified.

ALEXANDER H. MARTIN, JR.
Attorney for Petitioner.

Dated: April 29, 1964

CERTIFICATE OF SERVICE

I, Alexander H. Martin, Jr., Esq., Attorney for the Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of April, 1964, I served copies of the foregoing Petition for Rehearing after Denial of Certiorari upon the Unauthorized Practice of Law Committee of Cuyahoga County, Ohio, the respondent herein, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to respondent's attorneys of record, as follows:

To: Merritt W. Green, Esq.
400 Security Building
Toledo, Ohio

To: Alan M. Wolk, Esq.
941 Society National Bank Building
Cleveland, Ohio 44114

To: Gilbert Weil
300 Leader Building
Cleveland, Ohio 44114

ALEXANDER H. MARTIN, JR., Esq.
Attorney for Petitioners
507 Lawyers Building, Cleveland, Ohio 44113

APPENDIX

4123.519 Appeal to court of common pleas.

The claimant or the employer may appeal a decision of the industrial commission in any injury case, other than a decision as to the extent of disability, to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state. Like appeal may be taken from a decision of a regional board from which the commission has refused to permit an appeal to the commission provided, that the claimant may take an appeal from a decision of the administrator on application for reconsideration or from a decision of a regional board. Notice of such appeal shall be filed by the appellant with the commission and the court of common pleas within sixty days after the date of the receipt of the decision appealed from or the date of receipt of the order of the commission refusing to permit an appeal from a regional board of review. Such filings shall be the only act required to perfect the appeal and vest jurisdiction in the court.

Notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

The administrator of the bureau of workers' compensation, the claimant, and the employer shall be parties to such appeal and the commission shall be made a party if it makes application therefor.

The attorney general or one or more of his assistants or special counsel designated by him shall represent the administrator and the commission. In the event the attorney general or his designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of

the administrator or the commission as his or its attorney in such appeal. Any attorney so employed shall continue his representation during the entire period of the appeal and in all hearings thereof except where such continued representation becomes impractical.

Upon receipt of notice of appeal the commission shall cause notice to be given to all parties who are appellees.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition setting forth the basis for the jurisdiction of the court over the action and setting forth the issues. Further pleadings shall be had in accordance with the rules of civil procedure, provided, that service of summons on such petition shall not be required. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though such physician is a resident of or subject to service in the county in which the trial is had. The cost of the deposition filed in court and of copies of such deposition for each party shall be paid for by the industrial commission from the surplus fund and the costs thereof charged against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in such appeal. In the event such a deposition is taken and filed, the physician whose deposition is taken shall not be required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of such action.

The court shall certify its decision to the commission and such certificate shall be entered in the records of the court and appeal from such judgment shall be governed by the law applicable to the appeal of civil actions.

The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the industrial commission if the industrial commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. Such attorney's fee shall not exceed twenty per cent of an award up to three thousand dollars and ten percent of all amounts in excess thereof, but in no event shall such fee exceed seven hundred and fifty dollars.

If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if such judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

An appeal from a decision of the commission in which an award of compensation has been made shall not stay the payment of compensation under such award or payment of compensation for subsequent periods of total disability during the pendency of the appeal. In the event payments are made to a claimant which should not have been made under the decision of the appellate court, the amount thereof shall be charged to the surplus fund under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, such amount shall not be charged to the employer's experience. In the event the